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December 9, 1996

EX PARTE OR LATE FILED

Ex Parte Filing

William F. Caton, Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149

Dear Mr. Caton:

Enclosed for filing in this docket are the original and one copy of a letter to Chris Wright discussing the scope of the joint marketing restriction in section 271(e)(1) of the 1996 Act. The letter was submitted on behalf of Bell Atlantic Corporation and SBC Communications Inc. I would ask that you include this letter in the record of this proceeding.

If you have any questions concerning this matter, please contact me at (202) 326-7902.

Thank you for your consideration.

Yours sincerely,

Michael K. Kellogg

cc: Chris Wright
Richard Metzger

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December 9, 1996

Mr. Christopher Wright
Deputy General Counsel
Federal Communications Commission
1919 M Street N.W.
Room 614
Washington, D.C. 20554

Re: Joint Marketing Prohibition in Section 271(e)(1)

Dear Chris:

In our meeting on Thursday, you raised several questions concerning the scope of the prohibition on joint marketing in section 271(e)(1) of the 1996 Act. Specifically, you wanted to know whether joint advertising of local and long distance service would be included and, if so, how the Commission could draw a line between the advertising of resold local service, under section 251(c)(4), and the advertising of local service provided over the IXC's own facilities or over unbundled loops purchased by the IXC under section 251(c)(3). You also asked whether section 271(e)(1) requires separate sales forces for resold local and IX service, and whether it permits dial-tone referrals.

In our view, the prohibition on joint marketing must be understood to include joint advertising, the use of a single sales force, and in-bound service marketing. That is, of course, precisely the tentative conclusion that the Commission has reached in interpreting the term "joint marketing" in section 601(d) of the 1996 Act. In its Notice of Proposed Rulemaking, Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services, WT Dkt. No. 96-162, GEN Dkt. No. 90-314 at para. 64 (Aug. 13, 1996), the Commission "propose[d] to define 'joint marketing' as referenced in that provision as the advertising, promotion, and sale, at a single point of contact, of the CMRS, telephone exchange service, exchange access, intraLATA and interLATA telecommunications, and

information services provided by the BOC. Such joint marketing also includes, but is not limited to, activities such as promotion, advertising and in-bound service marketing."

Our understanding of the term "joint marketing" in section 271(e)(1) is also confirmed by section 274(c), which specifically includes, under the general rubric of "joint marketing," "any promotion, marketing, sales, or advertising for or in connection with an affiliate." Since the term "joint marketing" is common to both these provisions, and since both provisions are part of the same statute, it is only reasonable to conclude that Congress intended the same term to have the same meaning in both places.

Historically, too, the Commission has always interpreted a joint marketing restriction as including joint advertising and the use of a single sales force. As early as 1980, the FCC concluded that the joint marketing restriction for enhanced services and CPE included joint advertising. Memorandum Opinion and Order, Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 84 FCC 2d 50, 85 at para. 103 (1980). Only institutional advertising could be done jointly. Any advertising that mentioned specific products or services (e.g., local and long distance) could not. Id. See also Final Decision, Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384, 477 at para. 239 ("[T]he unregulated subsidiary must do its own marketing, including all advertising related to the offering of any service or equipment it offers. Affiliated entities may not advertise on behalf of the subsidiary.").

The Commission also made it clear, at the same time, that the prohibition on joint marketing meant that the enhanced service or CPE affiliate must have its own separate sales force. No sharing of marketing personnel was permitted. Id. See also Furnishing of Customer Premises Equipment by the Bell Operating Companies and the Independent Telephone Companies, 2 FCC Rcd 143, 156 at para. 90, 92 (1987) (noting that eliminating joint marketing restriction would enable BOCs to offer "one-stop shopping," so that CPE could be provided through the network sales departments). Even referrals by the regulated entity to the unregulated affiliate were precluded under the joint marketing ban. Thus, when the FCC decided that the unique circumstances created by divestiture justified allowing the BOCs to do referrals, it had to create an express exception to allow them to do so. Report and Order, Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies, 95 FCC 2d 1117, 1143 at para. 67 (1983). And, even in that case, the BOC was required to follow a careful script to ensure that

customers were first informed that the BOC itself no longer provided CPE and that there were a number alternative suppliers, including its separate CPE affiliate. Only then could the contact person "ask the customer if he or she wishes to be transferred to the separate organization's marketing personnel and complete the transfer of the call if the customer desires." Id. at para. 68.

These historical precedents should inform the Commission's reading of the joint marketing prohibition in section 271(e)(1). Indeed, when Congress uses a term in a particular regulatory context, and that term has a history of agency interpretation, Congress must be presumed to know of, and endorse, that interpretation. See, e.g., McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 342 (1991) (Congress presumed to use terms in accord with their "established meaning"); United States v. Myers, 972 F.2d 1566, 1573 (11th Cir. 1992) ("Congress is deemed to know the executive and judicial gloss given to certain language and thus adopts the existing interpretation unless it affirmatively acts to change the meaning") (internal quotation omitted), cert. denied, 507 U.S. 1017 (1993).

Our reading of the joint marketing prohibition is also in keeping with legislative history. The express purpose of section 271(e)(1) was to ensure that competition not be skewed by permitting the large interexchange carriers to offer one-stop shopping relying on resold local services before the Bell company in a state receives long distance authority in that state and can offer the same. S. Rep. No. 23, 104th Cong., 1st Sess. 43 (1995) (joint marketing restriction intended "to provide parity between the Bell operating companies and other telecommunications carriers in their ability to offer 'one stop shopping' for telecommunications services"); id. at 23 (restriction provides "parity among competing industry sectors"). One-stop shopping not only offers benefits to consumers (in the form of convenience and potential savings on bundled packages of services), it also offers efficiencies to the producer (in terms of sales personnel and advertising expenses). Those are precisely the sort of efficiencies that a joint marketing ban has been understood to preclude and that Congress must be presumed to have precluded when it enacted section 271(e)(1). Indeed, local telephone services are generally priced at artificially low levels for public policy reasons, and providing those services to IXCs at a wholesale discount means that consumers of the Bell companies' other services must bear part of the cost of the resold services. Providing IXCs with the added advantage of being able to jointly market those services before the Bell companies could do likewise would merely favor one competitor over another, and consumers as a whole would suffer in the long run from the skewed competition created by uneven entry regulations.

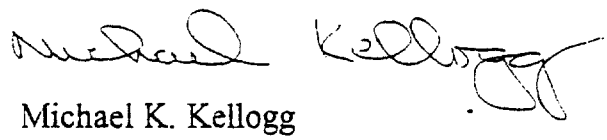
It may well be that some line-drawing problems are posed by the fact that, under the Commission's recent ruling in CC Dkt. No. 96-98, the large IXCs can jointly market IX service along with local service provided over their own facilities or over unbundled loops purchased from the LECs pursuant to section 251(c)(3). But these line drawing problems do not infect most aspects of the ban on joint marketing. A ban on bundled packages of services and on using a single sales force is readily enforceable. Whatever an IXC may do with its own local facilities or with unbundled loops, it may not package IX service with resold local service, and it may not use the same sales personnel to sell those two services. That means that even "in-bound service marketing" is forbidden, since that is a traditional attribute of joint marketing.

The only place line-drawing problems arise is with advertising. Even assuming for present purposes that, under the Commission's Interconnection Order, IXCs are not precluded from advertising their ability to provide both IX and local service over their own facilities or over unbundled loops, they must at least ensure that such ads do not imply the joint marketing of IX and resold local service. Indeed, any such inference would be misleading. At a minimum, therefore, in areas where both resale customers and facilities-based customers would be reached by the same ad, the IXC would have to include a clear disclaimer that its offer only applies to customers that are reached by its own (or unbundled) facilities. If the IXC wants to reach resale customers, it would have to advertise separately and focus only on its own local service. This would further Congress's stated objective of preserving parity of competitive opportunity when long distance carriers are reselling local services — many of which will be purchased at a discount off already below-cost prices — by avoiding suggesting to consumers that the services are available jointly as a package when in fact they are not.

Obviously, the Commission cannot draw up detailed guidelines in advance to cover all possible advertising permutations. Instead, the Commission should articulate the general principles outlined above and then set up a mechanism for resolving disputes if and when they arise. Given the short time frame for the ban on joint marketing and the fact that IXCs may enter many local markets on a resale basis in the short term, the Commission need not fear being overwhelmed with complaints, any more than it was in 1980 when it adopted similar rules that barred joint marketing of local service and CPE. Even if that were a concern, however, it would not justify backing away from the clear mandate of Congress to prohibit joint marketing in all its forms.

Please let us know if there is any further information we could provide on these issues. We attach a draft proposed rule for your consideration.

Yours sincerely,



Michael K. Kellogg

cc: Richard Metzger

Proposed Rule on Joint Marketing

Until a Bell operating company is authorized to provide interLATA service in an in-region State, or until February 8, 1999, whichever is earlier, a telecommunications carrier that serves greater than 5 percent of the Nation's presubscribed access lines may not jointly market in such State telephone exchange service obtained from such Bell operating company for resale with interLATA services offered by that telecommunications carrier. For purposes of this provision, the term jointly market shall include the advertising, promotion, and sale, at a single point of contact (directly or through a third party), of a telecommunications carrier's interLATA service and a telephone exchange service obtained from a Bell operating company for resale. Such joint marketing also includes, but is not limited to, activities such as in-bound service marketing.

- **WHEN A 272 AFFILIATE ACTS AS A RESELLER OF LOCAL SERVICE, IT IS NOT AN ILEC**

A long distance affiliate that resells the local service of its affiliated incumbent local exchange carrier ("ILEC") does not thereby itself become an ILEC. A contrary rule would be inconsistent with section 251 of the Act and would make no policy sense.

- ILECs are defined in section 251(h) of the Act. They are specifically limited to those LECs that were both providing local service in a particular area and were a member of the exchange carrier association carrier at the time of enactment. The only additions are any successors or assigns of the narrowly defined pool of ILECs.

The act of reselling the local service of an affiliated ILEC does nothing to transform a section 272 long distance affiliate into a successor or assign of an ILEC. A successor "takes the place that another has left, and sustains the like part or character."[1] Similarly, an assignor must be "divested of all control over the thing assigned."[2] In other words, in order to qualify, the local operating company must cease to perform its role as a LEC, and the successor or assign must take its place. The exact opposite is true in the case of a long distance affiliate reselling an ILEC's service. By definition, the ILEC must still be acting as the ILEC. The affiliate's purchase for resale is no different than a competitor buying the same service on the same basis. Such a rule also makes no policy sense. Imposing ILEC status on the long distance affiliate means that the local service offered at a discount by the true ILEC would have to be offered at further discount by the 272 affiliate. This arrangement serves no policy goal and would only serve to

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1 *Safer v. Perper*, 569 F.2d 87, 95 (D.C. Cir. 1977)) (citing *Wawak Co. v. Kaiser*, 90 F.2d 694, 697 (7th Cir. 1937).

2 *Miller v. Wells Fargo Bank International Corp.*, 540 F.2d 548, 558 (2d Cir. 1976).

prevent the 272 affiliate from acting as a reseller in the first place. The end result would be a limitation on the choices offered to consumers with no offsetting benefit to competition.

Constitutionality of § 271(e)'s Joint-Marketing Restriction

Section 271(e)(1)'s restriction on joint advertising of long-distance and resold local-exchange services does not contravene the First Amendment for the following reasons.

First, section 271(e)(1)'s restriction differs materially from the restrictions that courts have struck down in the past. Courts have invalidated restraints on commercial speech where the government has attempted to restrict the dissemination of accurate information about an activity that is otherwise *lawful*.[1] By contrast, section 271(e)(1) prohibits the advertising of activity that is made expressly *unlawful* under the terms of the same provision — namely, the joint sale of long-distance and resold local-exchange services. Since a long-distance carrier cannot lawfully *sell* the services jointly, it may not *advertise* the sale of such services jointly. Any advertisement implying that a carrier offers such services for sale jointly would be false or misleading.[2] As the Supreme Court has made clear, the First Amendment does not protect false or misleading commercial speech. *See 44 Liquormart*, 116 S. Ct. at 1505 ("When a State regulates commercial messages to protect consumers from misleading [or] deceptive . . . sales practices, . . . the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review.") Because a long-distance carrier has no constitutionally protected right to advertise that which it cannot lawfully do, and because it is difficult to imagine any joint advertising of long-distance and resold local services that would not convey misleading impressions, section 271(e)(1) presents no legitimate First Amendment concerns.

Second, even if a long-distance carrier could craft an accurate and non-misleading advertisement that refers to both long-distance and resold local-exchange services but that does not suggest the joint sale of those services, section 271(e)(1)'s prohibition on such joint advertising would still pass constitutional muster. Under *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980), a restriction on non-misleading commercial speech will be sustained if it "directly advances" a "substantial" governmental interest and is "not

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[1] *See 44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1501 (1996) (holding invalid State's statutory prohibition against advertisements "that provide the public with accurate information about retail prices of alcoholic beverages").

[2] Under well-established precedent, an advertisement is deemed deceptive if it has any tendency to convey a misleading impression, even if an alternative non-misleading impression might also be conveyed. *See, e.g., United States v. Ninety-five Barrels of Vinegar*, 265 U.S. 438, 443 (1924) ("Deception may result from the use of statements not technically false or which may be literally true."); *Chrysler Corp. v. FTC*, 561 F.2d 357, 363 (D.C. Cir. 1977) ("[i]t is a well settled principle that advertisements may be deceptive if they have a tendency and capacity to convey misleading impressions to consumers even though other nonmisleading interpretations may also be possible"); *Country Tweeds, Inc. v. FTC*, 326 F.2d 144, 147-48 (2d Cir. 1964) ("What is important in determining whether a statement is misleading is the over-all impression it tends to create on the public."); *P. Lorillard Co. v. FTC*, 186 F.2d 52, 58 (4th Cir. 1950); *Parker Pen Co. v. FTC*, 159 F.2d 509, 511 (7th Cir. 1946) (in protecting the public against deceptive advertising, the FTC's "duty is to protect the casual, one might even say the negligent, reader as well as the vigilant and more intelligent and discerning public").

more extensive than is necessary to serve that interest." *Id.* at 566. *See 44 Liquormart*, 116 S. Ct. 1495 (majority of Justices agreeing that *Central Hudson* remains the proper standard for determining whether a commercial-speech restriction survives First Amendment scrutiny). Section 271(e)(1) satisfies each element of that test.

- **There is a substantial governmental interest.** The government plainly has a substantial interest in preventing long-distance carriers from gaining an artificial, market-skewing competitive advantage in the joint provision of long-distance and resold local services. Unlike interconnection and network elements — which must be priced on the basis of cost plus a reasonable profit — services offered for resale must be priced on the basis of retail rates less avoided costs. Since the regulated retail rates for certain local exchange services are already *below* cost, a long-distance carrier providing resold local services can offer local and long-distance services at prices which, in the aggregate, do not cover the underlying cost of providing the services. A ban on joint sale would not, by itself, adequately protect against these market harms. Even if such services were sold separately, a long-distance carrier could achieve an unwarranted marketing advantage — thereby endangering competition — just as effectively by *advertising* the services jointly.

- **The joint marketing prohibition directly advances the governmental interest.** The prohibition on joint marketing — and in particular on joint advertising — directly advances this interest by minimizing the risk that long-distance carriers will be able to exploit these temporary regulatory disparities to get a jump start on Bell operating company competitors in offering one-stop-shopping. If long-distance carriers had been left free to engage in joint advertising, the very market distortions that Congress sought to avoid would have been inevitable.

- **The restriction is not more extensive than necessary to serve the governmental interest.** The restriction is narrowly tailored to prevent the specific market harms that Congress was concerned about. First, the restriction is triggered only if the long-distance carrier elects to purchase a Bell company's service for resale at wholesale rates under section 251(c)(4); the provision does not bar a long-distance carrier from jointly advertising long-distance and local-exchange services if it provides that local service either through its own facilities or through a combination of its own facilities and the unbundled network facilities of an incumbent local exchange carrier. By limiting the restriction to resold services, Congress both encourages the development of facilities-based local exchange competition and addresses the particular dangers that attend the below-cost purchase of local service for resale. Second, the restriction is also temporary: it expires in a particular State as soon as the Bell company is authorized to provide in-region long-distance service or after 36 months from enactment, whichever is earlier. *See Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371, 2380 (1995) (upholding a ban on lawyer direct-mailing to accident victims in part because it was "limited to a brief period"). Since most local service offered by long-distance carriers during the restriction's three-year existence is likely to be provided through resale, each of these limitations reinforces the

reasonableness of the other. Finally, there is no equally effective, less-burdensome means of achieving the important governmental purposes.

In sum, there is no substantial constitutional impediment to the Commission's enforcement of the joint-marketing restriction. Even if the First Amendment concerns were more significant, however, the Commission would have no reason to retreat from applying the provision as it is written. So long as the restriction's constitutionality is legally defensible — as this one unquestionably is — the Commission's duty is to enforce and defend the law enacted by Congress and to allow the courts to adjudicate the constitutional questions.